Supreme Court
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No. 03-

IN THE

Supreme Court of the United States

SHAWNN CUNNINGHAM,

Petitioner,

v.

LAURA HAMILTON and R. J. CLARK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a § 1983 case where a plaintiff/citizen was shot multiple times by two police officers and severely injured and the forensic evidence conclusively shows that the police officers lied as to what transpired, may a Court conclude, as a matter of law, that the police officers were justified in shooting the plaintiff/citizen because of their alleged reasonable perception of danger?

2. In viewing the following scenario:

   a. A police officer approached a plaintiff/citizen from behind and observed him celebrating the New Year by firing shots from a pistol into the air and screams at him;

   b. the citizen turns to face the voice and sees that it is a police officer. At this point, the citizen is holding the pistol loosely in his left hand and down to his side with the barrel pointed towards the ground;

   c. the lighting is good and the police officer can clearly see what the citizen is doing and can observe that the pistol is being held loosely and is pointed towards the ground. The officer is in a "high ready" position with her weapon drawn and pointed at the citizen and is approximately 10 to 15 feet from the citizen;

   d. the citizen does not receive an admonishment to place the weapon down but is shot almost instantaneously when he turns to face the officer;

e. the officer has agreed that in that scenario she would not have perceived danger and would not have been justified in shooting the citizen especially when the citizen never pointed the weapon at her or anyone else;

is it error for a Court to rule, as a matter of law, that the police officer was justified in shooting the citizen because of her reasonable "perception of danger" that she herself has denied?

LIST OF ALL PARTIES

The parties to the proceedings below were the petitioner before this Court, Laura Hamilton, R. J. Clark and the County of Henrico.

CORPORATE DISCLOSURE STATEMENT

There are no corporations involved in this matter and accordingly there are no disclosures to be made pursuant to Rule 29.6 of the Rules of the United States Supreme Court.

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No. 03-

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SHAWNN CUNNINGHAM,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Shawnn Cunningham (hereinafter "Cunningham"), by counsel, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in that Court on January 12, 2004.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is unpublished and is reprinted in the Appendix. (App. 1a to 3a). The Order and Memorandum Opinion of the United States District Court for the Eastern District of

Virginia is reprinted in the Appendix. (App. 7a to 20a). The Order of the United States District Court denying Cunningham's Motion to Reconsider is reprinted in the Appendix. (App. 4a to 6a).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on January 12, 2004. Suit was initially filed in the Circuit Court of the County of Henrico, a State Court in Virginia. The suit alleged a cause of action pursuant to 42 U.S.C. § 1983 and the matter was removed to Federal Court by the Respondents pursuant to 28 U.S.C. §§ 1441 and 1446 and Rule 81(c) of the Federal Rules of Civil Procedure. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The case involves 42 U.S.C. § 1983 which states as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Cunningham, sued Laura Hamilton ("Off. Hamilton") and R. J. Clark ("Off. Clark"), individually and in their capacities as Henrico County Police Officers pursuant to 42 U.S.C. § 1983. In his Motion for Judgment, Cunningham alleged that on January 1, 2000, Officers Hamilton and Clark assaulted and battered him by, among other things, shooting him with bullets from their pistols without legal justification. Cunningham claimed injuries from the assault. Cunningham and the officers gave greatly conflicting versions as to how the incident occurred. The forensic evidence completely supports Cunningham's version and shows that the officers' version was contrived.

The officers filed a Motion for Qualified Immunity and Motion for Summary Judgment. In their motion, Off. Hamilton and Off. Clark presented the case as if the only facts that existed were those that they asserted, ignoring both Cunningham's version and the compelling forensic evidence. In its Memorandum Opinion of April 25, 2003 and its Order of the same date, the United States District Court sustained the Motions for Qualified Immunity and Summary Judgment filed on behalf of Off. Hamilton and Off. Clark. The opinion of the District Court took no notice of the forensic evidence and did not otherwise place Cunningham's version in proper context.

Cunningham then filed a Motion To Reconsider with a supporting brief and respectfully pointed out to the Court that it had failed to place Cunningham's version in the proper context. Cunningham also drew the Court's attention to the fact that Off. Hamilton admitted that she would not have shot Cunningham had the events occurred as contended by

Cunningham. In denying the Motion To Reconsider, the Court discounted Cunningham's version "[b]ecause that is not what she (Off. Hamilton) observed . . ." By its own language, therefore, it is apparent that the District Court reflexively accepted Off. Hamilton's version of events, notwithstanding the glaring forensic evidence in the case which showed that her version of events constituted a physical impossibility.

According to Cunningham, on January 1, 2000, he went to the backyard of the townhouse known as 400 Hickorywood Circle located in Henrico County, Virginia in order to celebrate New Year's. Without a doubt, Cunningham's method of celebrating was inappropriate as he fired two or three rounds from a pistol into the air. As Cunningham is left handed, he fired the rounds with his left hand. After shooting the weapon, Cunningham heard Off. Hamilton scream at him from the gate entrance to the backyard of the townhouse. At this time, Cunningham's back was to the officer and the pistol was pointing to the ground as Cunningham had lowered his arm. Cunningham was then holding the pistol loosely in his left hand. Cunningham turned in an effort to try to understand what Off. Hamilton was saying and was shot almost instantaneously by Off. Hamilton and Off. Clark. The officers admitted that the lighting was good in the backyard of the townhouse and they could clearly see Cunningham and what he was doing. As Off. Hamilton approached Cunningham, she stated that she was in the "high ready" position with her gun drawn and pointed directly at Cunningham. Officer Hamilton was then about ten to fifteen feet from Cunningham.

Cunningham never pointed the pistol at anyone, including the officers, nor did he threaten anyone. At the time Cunningham was shot, he did not pose a threat to anyone

and he was not given any warnings or commands by the officers, except for possibly the scream from Off. Hamilton when he had his back turned. As Off. Hamilton could clearly see Cunningham and was in the "high ready" position, she had an advantage over Cunningham.

At Off. Hamilton's deposition, she admitted that commands to citizens with pistols are to be clear and concise. The reason that the commands must be clear and as simple as possible is so that those who hear the commands will understand them. In Off. Hamilton's experience people do not readily understand what is initially being said and an individual needs at least a few seconds to respond. Off. Hamilton admitted that if Cunningham had his arm to his side and just turned to face her to find out what she was saying, and if he was not pointing the gun at her, then she would not have been justified in shooting him. The key to this consideration then is the fact that Cunningham was not pointing a weapon at Off. Hamilton.

Off. Hamilton never testified or stated that when Cunningham initially turned to face her, and did not instantaneously put the pistol down, she was fearful for her life and accordingly opened fire on Cunningham, even though Cunningham was not pointing the pistol at her. In all, Cunningham was shot seven times by the two officers. In an Affidavit, Cunningham stated:

> I heard Officer Hamilton over my right shoulder yell to me, although I did not know what she stated. I then turned to face her to try to find out what she was saying and was somewhat stunned to see an armed police officer pointing a pistol at me. Before I had time to react, I was shot by Officer Hamilton and Officer Clark.

At the time Cunningham was shot, he was positioned so as to form a triangle between himself, Off. Hamilton and Off. Clark. Off. Hamilton was basically in front of Cunningham and Off. Clark was basically to Cunningham's right side. Off. Clark, at this time, was standing on an air conditioning unit of the adjacent townhouse and was peering over a six foot high fence.

The officers' version differs materially from Cunningham's version. Off. Hamilton claims that after she approached the opening to the back yard of the townhouse she ordered Cunningham to put the weapon down. According to Off. Hamilton, rather than doing as instructed, Cunningham circled the yard and eventually positioned himself behind a discarded Christmas tree. Off. Hamilton stated that Cunningham then crouched down like a catcher and pointed his pistol at her, grasping the pistol with both hands. By this time, Off. Clark was standing on the air conditioning unit of the townhouse next door. Off. Clark, who was supposedly then directly behind Cunningham, was able to peer over the fence to see Cunningham. Off. Hamilton stated that she initially opened fire on Cunningham, apparently missing him with the first shot and striking him with the second. Off. Hamilton then realized that Off. Clark was directly behind Cunningham and feared a cross-fire. Off. Hamilton then backed away and Off. Clark opened fire on Cunningham. The officers contended that Cunningham continued to grasp the pistol, with both hands completely covering its handle, until after the final shot. Cunningham then slumped over and the police surrounded and arrested him.

The problem with the police officers' version, and the reason that Cunningham can prove that the officers lied, is that a bullet from one of the officers' pistols entered the palm of Cunningham's left hand and exited the back of his hand, a fact

that would have been a physical impossibility had Cunningham been gripping the pistol as the officers' claim. The entry and exit wounds were verified by Dr. Pozez, the MCV surgeon who operated on Cunningham's hand. Further, there was no damage to the pistol that Cunningham used in the incident.

In addition to Dr. Pozez's opinions, the opinions of Dr. Michel Aboutanos were designated. Dr. Aboutanos opined that virtually all of the shots that injured Cunningham came from Cunningham's right and were heading towards Cunningham's left side. In particular, Dr. Aboutanos opined that a bullet entered the upper right portion of plaintiff's right leg and exited towards the inner portion of plaintiff's right leg, traveling from right to left and slightly downwards. Dr. Aboutanos also opined that a bullet entered the right side of plaintiff's left calf and exited the left back portion of that same calf, again traveling right to left in a somewhat downwards motion.

Furthermore, the officers provided the affidavit of their expert, Dr. Fiero, which included opinions that are inconsistent with the officers' version of events. Among other things, Dr. Fiero opined, as did Dr. Aboutanos, that a bullet struck Cunningham's right shin and continued until it struck and went through the back portion of Cunningham's left calf. Dr. Fiero has also opined that one of the officers' bullets entered Cunningham's right buttock and exited the inner portion of the plaintiff's right thigh. In one of Cunningham's affidavits, he clarified that that bullet entry was in the portion of his right leg that attaches to his buttock. That portion of the body could be referred to as either Cunningham's buttock, leg or both and accordingly this opinion of wound entry is consistent with Dr. Aboutanos' opinion. The officers contended that Off. Hamilton was directly in front of

Cunningham and that Off. Clark was directly behind and over Cunningham when they shot Cunningham. However, the bullet that struck Cunningham's right shin and passed through his left calf had to have come from Cunningham's right, and the injury could not have occurred had he been positioned as a "catcher," as the defendants contend. The same is true of the bullet that Dr. Fiero and Dr. Aboutanos have opined entered Cunningham's buttock.

REASONS FOR GRANTING THE PETITION

The Petition should be granted for two reasons. First, the Fourth Circuit Court's decision conflicts with holdings of other Circuits. Second, the Fourth Circuit Court's decision has so far departed from the accepted and usual course of judicial proceedings so as to call for exercise of this Court's supervisory power.

I. THE FOURTH CIRCUIT'S DECISIONS ON THE ISSUE ARE IN CONFLICT WITH OTHER CIRCUITS AND ARE ENDANGERING OUR CITIZENS.

This Court has determined that, under a claim of qualified immunity, use of force is Constitutional if it is objectively reasonable under the Fourth Amendment. *Graham v. Conner*, 490 U.S. 386 (1989). Factors to determine reasonableness include the following:

> . . . the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. *Id.* at 396.

That reasonableness is to be judged from the perspective of a reasonable officer on the scene, rather than with the use of 20/20 hindsight. *Id.*

In viewing the case law from the various Circuits, the Fourth Circuit seems to be the most inclined to determine that qualified immunity applies.

Moreover, the Fourth Circuit has an unpublished opinion which was relied upon heavily by the District Court in this matter and will continue to be relied upon by the Fourth Circuit in finding qualified immunity. That case is *Mack v. Reddick*, 1995 U.S. App. Lexis 3113 (1995). In *Mack*, Officer Reddick responded to a call for service for gunshots fired in a residential neighborhood. He was told a "black male dressed in black" was firing a weapon near an apartment complex. Officer Reddick then confirmed the information with the apartment manager and observed an intoxicated black male holding a gun and arguing with another man on a balcony. Officer Reddick identified himself as a police officer and ordered Mack to drop the weapon several times. Mack disregarded the commands and raised his gun as if to shoot the other man. Officer Reddick then opened fire and shot Mack.

Mack claimed that there was a jury issue and that qualified immunity should not apply because Mack claimed that Officer Reddick did not identify himself as a police officer nor did he order Mack to drop his gun. Mack claimed that he was shot within seconds of exiting the porch door rather than after having received repeated orders from the Officer to drop his gun. Mack claimed that he never raised his weapon towards anyone.

The *Mack* decision, and other decisions of the Fourth Circuit, seem to lead to District Court Judges in the Fourth Circuit to conclude that the police are justified in shooting an individual if he has a weapon. Moreover, the Fourth Circuit does not seem to view the cases differently when there is a *contentious* factual dispute. In the case at bar, Cunningham's version of events and that of the police officers were diametrically opposed. When viewed with the forensic evidence, it is clear that the officers lied about what transpired. This created a tacit admission that the officers were not justified in shooting Cunningham. This admission is made even stronger by Officer Hamilton's own admission that, under the circumstances claimed by Cunningham, she was not justified in shooting Cunningham.

In *Sova v. City of Mt. Pleasant*, a decision from the Sixth Circuit, the Court ruled that summary judgment is inappropriate where there are *contentious* factual disputes of the reasonableness of the use of deadly force. *Sova v. City of Mt. Pleasant*, 142 F.3d 898 (6th Cir. 1998). *Sova*'s decedent (Thomas), was depressed and was threatening suicide. Thomas had apparently stabbed himself in the chest and arms several times. Apparently when the police arrived at the residence, Thomas demanded that the police leave and threatened the police. Thomas was observed in the kitchen with two butcher knives and blood running from the gashes on his arms and chest. The police contend that Thomas threatened to get a gun and that his father told the police there were firearms in the house. At one point, Thomas went outside with the knives pointed in the air and threatened numerous people in the yard. Thomas then returned to the kitchen and slammed the door. Thomas then broke the kitchen windows with a knife and one of the officers asked Thomas what he wanted. Thomas said that he wanted the police to shoot him.

As Thomas moved towards the kitchen door with the butcher knives, the officers were crouched in firing positions and screamed at him. Thomas was advised to drop the knives before he came out. The police contend that Thomas then pulled the kitchen door open, pushed the screen door and stepped on the porch still holding the knives. When Thomas exited the kitchen with the knives, he was shot by the police. After Thomas was shot, the police found several rifles laid out on the bed in the upstairs bedroom where Thomas had broken a window.

In contrast, the Sova's claimed that Thomas never said he was going to get a gun and was shot before he actually stepped out of the kitchen door frame. In denying qualified immunity as a matter of law, the Court held that "the central legal question is whether a reasonably well-trained officer in the defendant's position would have known that shooting the victim was unreasonable in the circumstances." *Id.* at 903.

In *Sova*, it was ruled that a jury was to determine the reasonableness of the police officer's action and to make a distinction between the two versions which were only subtly different. In both the police officer's version and *Sova*'s version, it was not known whether Thomas had a firearm in addition to his butcher knives. It was known that he had the butcher knives and that he had at least made it to the kitchen door frame while still in possession of the two butcher knives. Both sides agreed that he had been threatening the police officers. *Id.*

In the case at bar, Officer Hamilton, a trained police officer, already admitted that in viewing the evidence in the light most favorable to Cunningham she was not justified in

shooting Cunningham. This evidence shows Cunningham was not threatening Officer Hamilton or doing anything unlawful at the time he was confronted by Officer Hamilton (possessing a pistol is not illegal), that she could plainly see where the pistol was and that it was being held loosely, so loosely that a bullet was able to pass through the palm of Cunningham's hand, that he had made no aggressive move towards Officer Hamilton and she had the advantage by having her pistol trained on him about ten to fifteen feet away.

Cowan v. Breen is a Second Circuit case where the Court also determined that the police officer was not entitled to qualified immunity. *Cowan v. Breen*, 352 F.3d 756 (2d Cir. 2003). This § 1983 action was filed for the wrongful death of Victoria Cooper ("Cooper"). Cooper had been a passenger in a car that had been pulled over by Officer Breen. Officer Breen determined that the driver was in possession of narcotics and ordered the driver from the vehicle. However, the driver then fled the scene and Officer Breen chased the driver on foot. Cooper then began driving the vehicle in question. Officer Breen was later walking on Route 80 towards his police cruiser when he saw the vehicle with its headlights on heading towards him. Officer Breen claimed that he waved his arms to signal the vehicle to stop. However, the vehicle continued and Officer Breen, fearing for his safety, fired twice at the oncoming vehicle. The first shot hit the vehicle's hood. The second shot went through the driver's side window and killed Cooper.

Officer Breen contended that the vehicle could have avoided him by turning left off the road or making a U-turn. Apparently gunshot residue found on the driver's side of the vehicle show that Officer Breen was very close to the vehicle when he fired the second shot. The forensic evidence showed

that the vehicle was traveling about 20 to 30 miles per hour at the time of the second shot. Officer Breen argued that he was entitled to qualified immunity because he reasonably believed that his conduct was lawful. Indeed, the forensic evidence supported Officer Breen.

Cooper's administrator offered different evidence to show that at the time of the second shot Officer Breen was over to the side of the vehicle and perhaps as far away as eleven feet. The Second Circuit in that case denied qualified immunity by ruling as follows:

> Where the officer was standing, whether it was in the zone of danger, the speed and velocity of the Camaro, and the reasonableness *vel non* of the officer's alleged belief that he was in danger are issues which, among others, preclude summary judgment. Any decision on the defense of qualified immunity necessarily must await the presentation of evidence to the jury. *Id.* at 759.

Ting v. United States is a Ninth Circuit case where qualified immunity was also denied. *Ting v. United States*, 927 F.2d 1504 (9th Cir. 1991). Ting had been a suspect in a drug ring involving at least twenty-seven individuals. The FBI used a SWAT team to enter Ting's premises in order to arrest him before searching his premises. The agents had information that Ting was paranoid and unstable, that he possessed a firearm and that he had made threats to kill several unidentified individuals in the past.

After entering Ting's residence, the SWAT team located Ting in his bedroom. Ting was completely naked, kneeling behind the bed and aiming a handgun at them. The agents

identified themselves as FBI and instructed Ting to drop the gun. Ting dropped the gun as ordered. Ting was then ordered to lie in a prone position, face down on the floor. According to FBI agents, Ting then suddenly pulled his arm free from one of the agents, stood up and lunged towards an unsecured enclosed dressing area. Ting was then shot. No weapons were found in the dressing area.

However, the forensic evidence showed that the police officers' version of events was not credible. Ting presented evidence that he was shot at close range while in the prone position or on his hands and knees. The ballistic's expert opined that the gun that shot Ting was aimed and shot horizontally or downward within eighteen to twenty-four inches away. This evidence contradicted the agent's testimony that Ting, who was 6'5" tall was shot while upright from a distance of four to five feet. The Ninth Circuit ruled:

> If Ting's version of the shooting is believed, the trier of fact could find that Burns' use of deadly force was objectively unreasonable under the circumstances. *Id.* at 1510.

Similarly, as to the case at bar, a jury should be allowed to consider whether or not the use of force under the circumstances was unreasonable.

II. THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWER TO PROTECT THE CONSTITUTIONAL RIGHTS OF ALL CITIZENS.

There is a clear discrepancy in how the various Circuits are ruling on these cases. Moreover, the Fourth Circuit seems unconcerned by the fact that the officers clearly lied to cover up what they must have believed was an unjustified shooting. The net result was permanent injury to Cunningham.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED JANUARY 12, 2004

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 03-1639

SHAWNN CUNNINGHAM,

Plaintiff-Appellant,

v.

LAURA HAMILTON, Individually and in her capacity as a Police Officer for the County of Henrico; R.J. CLARK, Individually and in his capacity as a Police Officer for the County of Henrico,

Defendants-Appellees,

and

COUNTY OF HENRICO, VIRGINIA,

Defendant,

MEDICAL COLLEGE OF VIRGINIA,

Movant.

Appendix A

Submitted: December 19, 2003

Decided: January 12, 2004

Before WIDENER, WILKINSON, and DUNCAN, Circuit Judges.

OPINION

PER CURIAM:

Shawnn Cunningham appeals the District Court's order awarding summary judgment in favor of Officers Laura Hamilton and Richard J. Clark on Cunningham's excessive force claim pursuant to 42 U.S.C. § 1983 (2000), following the injuries he sustained from being shot several times by the defendants. The District Court granted summary judgment to the officers based on its finding that the officers were entitled to qualified immunity.* On appeal, Cunningham claims that the award of summary judgment was premature because alleged discrepancies in the affidavits of the officers and forensic and medical experts created issues of material fact that should have precluded summary judgment.

We review de novo a District Court's grant of summary judgment. *Higgins v. E.I. DuPont de Nemours & Co.*, 863 F.2d 1162, 1167 (4th Cir. 1988).

In the context of an excessive force claim, not every discrepancy creates a triable issue of fact. *Sigman v. Town of Chapel Hill*, 161 F.3d 782, 787 (4th Cir. 1998) (noting that it

* Cunningham does not challenge the Court's grant of summary judgment to the officers on his state law claims.

will nearly always be the case that witnesses will differ over what occurred). In this matter, Officer Hamilton testified that Cunningham crouched behind a Christmas tree with his gun pointed at her. However, Cunningham testified that he only turned and faced Hamilton with his gun down by his side and was shot within seconds. Cunningham contends that this factual dispute should be evaluated by the trier of fact. However, as the District Court noted, whether Cunningham pointed the gun at Hamilton was not dispositive. Rather, the proper inquiry is whether the officers reasonably and objectively believed that their safety was in danger. *See Sigman*, 161 F.3d at 786-87. On the facts of this case, we agree with the District Court's conclusion that, even accepting Cunningham's version of events, the officers' belief they were in danger was objectively reasonable.

Accordingly, we affirm the judgment of the District Court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and oral argument would not aid the decisional process.

AFFIRMED

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION DATED MAY 7, 2003

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

Civil Action No.: 3:02-CV-900

SHAWNN CUNNINGHAM,

Plaintiff,

v.

LAURA HAMILTON, et al.,

Defendants.

ORDER
(Motion to Reconsider)

By order entered April 25, 2003, this Court granted the Defendants' Motion for Qualified Immunity and Summary Judgment. The case is now before the Court on Plaintiff's Motion to Reconsider.

Plaintiff now contends that the Court misinterpreted several critical facts in its analysis of the circumstances underlying the defendant officers' decision to shoot him. First, viewing the evidence in the light most favorable to him, Plaintiff maintains that the time lapse between when he

realized Defendant Hamilton was a police officer and when she discharged her weapon was insufficient to allow him to drop his firearm.

Next, Plaintiff directs the Court's attention to a hypothetical question posed to Defendant Hamilton in her deposition. During her deposition, Hamilton testified that the Plaintiff pointed a handgun at her, a fact Plaintiff adamantly denies. When asked if she would have been justified in shooting the Plaintiff had he *not* pointed the weapon at her, Hamilton responded that, had he not pointed the gun, she would not have fired. Because that is not what she observed, however, Hamilton's response to the hypothetical question is both technically and legally irrelevant. Moreover, contrary to Plaintiff's position, Hamilton's response does not end the analysis. The determinative question is whether her actions were objectively reasonable when she decided to shoot.

In deciding the Defendants' Motion for Qualified Immunity and Summary Judgment, the Court measured the facts of this case against established Fourth Circuit jurisprudence. In that context, the factual disputes raised by the Plaintiff in his Motion to Reconsider do not call into question the reasonableness of the officers' perceptions. Moreover, although the Court must view the facts in the light most favorable to Plaintiff, it must weigh the reasonableness of the officers' actions from their perspective.

Appendix B

In the final analysis, the Court assesses the officers' actions and judgment by a standard of objective reasonableness. Consequently, and for the reasons stated in its Memorandum Opinion of April 25, 2003, the Court is of the opinion that the defendant officers' actions in this case were objectively reasonable. Accordingly, Plaintiff's Motion to Reconsider is DENIED.

The Clerk of Court is directed to send a copy of this Order to all counsel of record.

It is so ORDERED.

_____

United States District Judge

Richmond, Virginia
Date: May 7, 2003

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION DATED APRIL 25, 2003

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

Civil Action No.: 3:02-CV-900

SHAWNN CUNNINGHAM,

Plaintiff,

v.

LAURA HAMILTON, et al.,

Defendants.

ORDER

THIS MATTER came before the Court on Defendants' Motions for Qualified Immunity and for Summary Judgment and other pre-trial motions. After considering the pleadings, the relevant case law, and the parties' April 22, 2003 oral argument, and for the reasons set forth in the accompanying memorandum opinion, the Court finds that, with respect to Plaintiff's constitutional tort claims, the defendant officers are entitled to qualified immunity. The Court therefore GRANTS Defendants' Motion for Qualified Immunity as it relates to those claims. With respect to the remaining claim of assault and battery, the Court GRANTS Defendants' Motion for Summary Judgment.

Appendix C

Having disposed of this action on the merits, the Court need not rule upon the balance of the pending motions. Consequently, the Court DISMISSES all remaining pre-trial motions as moot.

It is so ORDERED.

Let the Clerk send a copy of this Order to all counsel of record.

/s/

United States District Judge

Richmond, Virginia
Date: April 25, 2003

APPENDIX D — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION DATED APRIL 25, 2003

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

Civil Action No.: 3:02-CV-900

SHAWNN CUNNINGHAM,

Plaintiff,

v.

LAURA HAMILTON, et al.,

Defendants.

MEMORANDUM OPINION
(Motion for Qualified Immunity and Summary Judgment)

This is a case brought under the Civil Rights Act, Title 42 U.S.C. § 1983, for the use of excessive force by officers of the Henrico County Police Department in violation of the Plaintiff's Fourth Amendment rights. The matter is before the Court on Defendants' Motion for Summary Judgment. Both sides have filed detailed memoranda of law and have been afforded an opportunity for oral argument.

Appendix D

The underlying incident occurred shortly after midnight on New Year's Day 2000. The Henrico County Police Department had received a citizen's complaint that firearms were being discharged in a residential neighborhood. The defendant officers, Laura Hamilton ("Officer Hamilton") and R. J. Clark ("Officer Clark"), were dispatched to 400 Hickorywood Circle, a townhouse unit located in the Ironwood Townhouses residential community. En route, Officer Hamilton was advised by the police dispatcher that one individual at the scene had a long gun, another had a handgun, and a third was going in and out of the house supplying the others with ammunition. Both defendant officers believed that the neighborhood to which they were responding was a high crime area. As they individually approached 400 Hickorywood Circle, each officer heard gunfire.

The officers continued to hear gunfire as they exited their vehicles and approached 400 Hickorywood Circle. Officer Hamilton heard gunshots being fired from the backyard of the townhouse. Officer Clark also heard gunshots being fired as he approached the backyard from the other side. Through missing boards in the backyard fence, Officer Hamilton observed two men firing weapons, one a long gun and the other a handgun. Officer Hamilton took a position in the fenced backyard, near a rear, open gate. Officer Clark positioned himself on top of an air conditioning unit near the backyard fence of an adjoining property. The backyard was illuminated by a porch light.

During a pause in the gunfire, the plaintiff, Shawnn Cunningham ("Cunningham") walked alone into the

backyard hold a pistol in his hand. He fired several rounds from the handgun into the air, which the officers observed. When the shooting ended, Officer Hamilton, in uniform, stepped through the backyard gate and shouted to the plaintiff, "Henrico Police – Drop your gun."

Although the foregoing facts appeared to be undisputed, the events which followed are controverted. Officer Hamilton recalls the plaintiff seeking cover behind a Christmas tree and pointing his firearm in her direction. Hamilton remembers that both she and Officer Clark continued to shout at the plaintiff, "Henrico Police – Drop your gun."

The plaintiff, on the other hand, recalls hearing a female's voice screaming or yelling from behind, but he could not discern what she was saying. Plaintiff remembers pivoting to the right and turning his whole body to face Officer Hamilton. He observed Officer Hamilton standing next to the gate pointing a gun at him. Plaintiff admits that he was still holding the pistol in his hand, but adamantly denies pointing the weapon at Officer Hamilton or seeking cover behind a Christmas tree. Plaintiff was fully aware that Hamilton was a police officer. Plaintiff said nothing in response to the officers, but did not drop his weapon as directed.

When Cunningham declined to surrender his weapon, Officer Hamilton believed she was in imminent danger of death or serious bodily injury and fired two shots at him. Officer Clark, who was positioned directly in front of Hamilton, heard the shots fired and observed plaintiff still holding the handgun. Believing that Officer Hamilton was

in imminent danger of death or serious bodily injury, Officer Clark fired five rounds at Cunningham. As a result of the gunshot wounds, plaintiff sustained serious injury. This lawsuit followed.

The defendant officers contend that the use of their weapons was justified and objectively reasonable, and that they are therefore entitled to qualified immunity and to summary judgment on the assault and battery claim. Plaintiff argues that there are material facts in dispute precluding qualified immunity and barring summary judgment. Plaintiff appears to misapply the controlling standard of objective reasonableness.

Where a plaintiff alleges that a police officer has unconstitutionally used deadly force, the officer's actions and judgment are measured by a standard of objective reasonableness. *Graham v. Conner*, 490 U.S. 386-97, 109 S. Ct. 1865 (1989).

Within the appropriate analytical framework, the Court deciding a plea of qualified immunity must focus on what a reasonable officer "on the scene" would have done. The Court must direct its attention to the facts as perceived by the police officer and whether the officer acted reasonably when confronted with the facts at hand. "The calculations of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments in circumstances that are tense, uncertain and rapidly evolving, about the amount of force that is necessary in a particular situation." *Id.* At 396-97. Summary judgment on the basis of qualified immunity is proper, notwithstanding

factual disputes, if those disputes do not call into question the reasonableness of an officer's perceptions. *Gooden v. Howard County*, 954 F.2d 960, 965 (4th Cir. 1992) (*en banc*). *See also*, *Sigman v. Town of Chapel Hill*, 161 F.3d 782, 787-88 (4th Cir. 1998)

If a reasonable officer could have found probable cause to believe that Cunningham presented a serious threat of personal harm at the time the officers fired their weapons, then as a matter of law the defendants are entitled to qualified immunity. *Slattery v. Rizzo*, 939 F.2d 213, 216 (4th Cir. 1991).

The United States Supreme Court recently clarified the analytical framework to be used in determining a defendant's entitlement to qualified immunity in excessive force case. The analysis must be conducted in two steps, which must be undertaken in the appropriate sequence. *See Sauicer v. Katz*, 121 S.Ct. 2151, 2155, 533 U.S. 194 (2001). Initially, the Court must determine whether "[t]aken in the light most favorable to the party asserting the injury . . . the facts alleged show that the officer's conduct violated a constitutional right." If plaintiff cannot surmount this hurdle, the analysis ends and the defendant is entitled to qualified immunity. *Id.* at 2156.

If the Court finds that the officer's conduct violated a constitutional right, the next sequential step is to ask whether the right was clearly established at the time of the events at issue. This inquiry must be made "in light of the specific context of the case, not as a broad general proposition." *Id.* If the right was not clearly established in the specific context of the case – that is, if it was not "clear to a reasonable officer"

that the conduct in which he alleged engaged "was unlawful in the situation he confronted" – then the law affords the officer immunity from suit. *Clem v. Corbeau*, 284 F.3d 543, 549 (4th Cir. 2002) (citations omitted).

Therefore, employing the *Saucier* test, the Court must initially decide whether taken in the light most favorable to the party asserting the injury, i.e., Cunningham, the facts alleged show that the officer's conduct violated a constitutional right. Clearly, the Fourth Amendment prohibits law enforcement officers from using excessive force against individuals. *See Graham*, 490 U.S. at 396-97. Whether an officer has used excessive force is judged by a standard of objective reasonableness. *Id.* In determining whether excessive force has been employed, courts should not inquire into an officer's motives, intentions or tendencies but should ask "whether a reasonable officer in the same circumstances would have concluded that a threat existed justifying the particular use of force." *Elliott v. Leavitt*, 9 F.3d 640, 642 (4th Cir. 1996). A the United States Supreme Court pointed out in *Bell v. Wolfish*, 441 U.S. 520, 559, 99 S.Ct. 1861 (1979), the test of reasonableness is "not capable of precise definition or mechanical application." The analysis requires careful attention to the facts and circumstances of each particular case. *Graham*, 490 U.S. at 396. Deadly force is justified only where a reasonable officer would have "sound reason to believe that a suspect poses a threat of serious physical harm to the officer or others." *Elliott*, 99 F.3d at 642. The Constitution does not permit the use of deadly force against a person who poses no threat to the officer and no threat to others. *Tennessee v. Garner*, 471 U.S. 1, 9, 150 S.Ct. 1694 (1985).

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In determining whether the totality of the circumstances in the immediate case justified the use of deadly force, the Court must review the facts in the light most favorable to the plaintiff. The analysis requires a careful parsing to eliminate material facts genuinely in dispute. When the basis for the defendant officer's actions are impressionistic, the Court will employ a test of reasonableness, as articulated in the cases discussed above.

It is beyond dispute that Officers Hamilton and Clark are dispatched on the night in question to a report of illegal gunfire in an area which they, as experienced officers, believed was a high crime area. The police dispatcher advised the officers that one individual had a long gun and the other a handgun. When the officers arrived separately at the scene, they immediately heard gunfire from the backyard of a townhouse. The discharge of a firearm in this residential area was clearly unlawful. As the officers approached the backyard of the townhouse, the gunfire continued. In the rear yard, both officers personally observed the plaintiff discharging a handgun several times into the air. At some point, Officer Hamilton, in uniform, stepped through the open, backyard gate and advised the plaintiff, "Henrico Police – Drop your gun." According to Hamilton, she uttered these words several times, then drew her firearm and pointed it toward the plaintiff.

Cunningham pivoted to the right and turned his full body to face Officer Hamilton. He did not drop the handgun. Officers Hamilton and Clark again informed him "Henrico Police – Drop your gun." Cunningham failed to drop his weapon and said nothing in response to the officers' commands.

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Believing she was in imminent danger of death or serious bodily injury, Officer Hamilton discharged her firearm at Cunningham. Immediately after hearing a weapon fired, Officer Clark observed him with a firearm in his hand. Fearful that Officer Hamilton had been shot, or was in danger of being wounded, Clark discharged his firearm, striking Plaintiff.

Whether the defendants' conduct violated a constitutional right of the plaintiff turns on whether a reasonable police officer in the defendants' position, would have sound reason to believe that Plaintiff was armed or otherwise sufficiently dangerous to justify the use of deadly force. Although it is unfortunate that Plaintiff was seriously injured, the Court believes that the defendant officers' actions were reasonable in the context of the totality of the circumstances. It is important to keep in mind that Courts "will not second guess the split-second judgment of a trained police officer merely because that judgment turns out to be mistaken, particularly where an action could have resulted in death or serious injury to the officer and others." *See McLenagan v. Karnes*, 27 F.3d 1002, 1007-08 (4th Cir. 1994). Even if Officer Hamilton misunderstood Plaintiff's response to her commands, her actions, as well as those of Officer Clark, were reasonable in light of the fact that Plaintiff refused to drop his weapon. *See Id.* As the United States Court of Appeals of the Fourth Circuit noted in *Elliott*, "the Fourth Amendment does not require omniscience... Officers need not be absolutely sure . . . of the nature of the threat or the suspect's intent to cause harm – the Constitution does not require that certitude precede the act of self protection." *Elliott*, 99 F.3d at 644.

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Several cases decided by the United States Court of Appeals for the Fourth Circuit are instructive in evaluating the reasonableness of the officers' actions in this case. In *McLenagan v. Karnes*, *supra*, several persons arrested for driving while intoxicated where being held in a detention area awaiting presentation to a magistrate. Fearing that one of the arrestees may have gained access to a firearm, one of the sheriff's deputies ran into the main hallway of the building, waving her arms in the air yelling "The man has got a gun." Also perceiving danger, the plaintiff, an arrestee, followed closely behind the deputy with his hands still cuffed in the front. The handcuffs constricted the plaintiff's range of motion causing him to run in a crouched position. As they ran down the hallway, the deputy continued to yell, "The man has got a gun." The defendant, a Richmond City Police Officer, turned and drew his weapon. The defendant officer observed Plaintiff approaching him immediately behind the deputy. From his position, the officer could not determine whether or not Plaintiff had a gun in his hand. Officer Karnes shot the plaintiff.

Reversing the trial court, the Fourth Circuit held that Officer Karnes was entitled to qualified immunity on the § 1983 claim against him. Relying upon *Tennessee v. Garner*, *supra*, the Court held that Officer Karnes' use of deadly force was not excessive, as he had probable cause to believe that the plaintiff posed a threat of serious physical harm to him and to other officers . *Garner*, 471 U.S. at 11.

Three observations by the Court in *McLenagan* are noteworthy in defining the contours of reasonable police action. First, the Court expressed its belief that a suspect's

failure to raise his hands in compliance with a police officer's command to do so may support the existence of probable cause to believe the suspect is armed. Second, the Court declined to fashion an inflexible rule that in order to avoid civil liability, an officer must always warn his suspect before firing. Third, the Court in *McLenagan* elected not to require a police officer in all instances to actually detect the presence of an object in a suspect's hand before firing on him. *McLenagan*, 27 F.3d at 1007.

In *Anderson v. Russell*, 247 F.3d 125 (4th Cir. 2001) the defendant police officer was approached at a mall by a patron who pointed out the plaintiff as a man who appeared to have a gun under his sweater. The officer spent the next twenty minutes observing the suspect and saw what the officer believed to be a bulge, consistent with a handgun, under the plaintiff's clothing on his left side near his waistband.

The officer decided to confront Plaintiff to determine whether he was in fact armed. When Plaintiff exited the mall, the defendant, accompanied by another officer, approached him in the parking lot with his weapon drawn and instructed Plaintiff to raise his hands and get down on his knees. Plaintiff initially complied with the order to raise his hands, but later lowered them without explanation and attempted to reach into his back left pocket. The defendant officer shot Plaintiff three times. Unfortunately, Plaintiff was not armed and was reaching into his rear pocket to turn off his portable radio. *Id.* At 127-29. In affirming the trial court's grant of qualified immunity, the Fourth Circuit stated that "given the uncontroverted evidence as to what Russell perceived immediately before firing, we do not believe that there is a

legally sufficient evidentiary basis for a rational jury to find for Anderson on the issue of excessive force." *Id.* At 131.

Even more closely analogous to the immediate case is *Mack v. Reddick*, an unpublished opinion in the Fourth Circuit found at 1995 U.S. App. Lexis 3113 (1995). In *Mack*, the Court separated out those facts in dispute and focused its analysis on the undisputed facts. In the final analysis, the Court found four facts determinative. First, the defendant officer had been summoned to investigate a report that shots were fired at an apartment complex. Second, the officer verified the report with the complex's assistant manager. Third, the officer observed an altercation between two men on the balcony who were belligerent and appeared intoxicated. Last, one of the men was holding a gun. The Fourth Circuit concluded that those undisputed facts provided an objectively reasonable basis for Officer Reddick's use of deadly force. *See Id.* At 6-8.

In the immediate case, the Court is of the opinion that the split-second decision of Officers Hamilton and Clark to use deadly force against Plaintiff was reasonable. Obviously, it is extremely unfortunate that Plaintiff was seriously injured. The officers' use of force however, did not constitute a Fourth Amendment violation under the facts of this case. The defendants are therefore entitled to qualified immunity.

Since the defendant officers' use of force was reasonable under the circumstances, Plaintiff's state law claim for assault and battery also fails as a matter of law.

Accordingly, the Defendants' Motion for Summary Judgment is GRANTED, and the case will be DISMISSED.

The Clerk of the Court is directed to send a copy of this Memorandum Opinion to all counsel of record.

It is so ORDERED.

_____

United States District Court Judge

Richmond, Virginia
Date: April 25, 2003